

June 27, 2002

Ms. Marlene H. Dortch, Esquire
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Letter in Support of Motion for Stay of Mandatory Negotiation Period,
ET Docket No. 95-18; DA 01-2610

Dear Ms. Dortch:

The following broadcasters, The ABC Television Network, Allbritton Communications Company, Belo Corp., Fox Television Stations, Inc., Gannett Broadcasting Co., Hearst-Argyle Television, Inc., LIN Television Corp., National Broadcasting Company, Inc., Tribune Company, and Viacom Inc. (collectively, “the 2 GHz Broadcast Group”) hereby submit for filing in the above-referenced proceeding this letter in support of the Motion for Stay of Mandatory Negotiation Period that was filed on October 22, 2001 by the National Association of Broadcasters and the Association for Maximum Service Television, Inc. As explained below, under the current circumstances a stay of the mandatory negotiation period for the relocation of incumbent Broadcast Auxiliary Service (“BAS”) licensees in the 2 GHz band is in the public interest.

This proceeding is not restricted and therefore presentations are permitted, but must be disclosed. Pursuant to Section 1.1206 of the Commission’s rules, an original and one copy of this letter are being filed with the Secretary.

I. Background

In the 2 GHz Relocation Order,¹ the Federal Communications Commission (“FCC” or “Commission”) established a two-year mandatory negotiation period for relocation of incumbent BAS licensees in the 30 largest television markets. If incumbent BAS licensees do not reach

¹ See Amendment of Section 2.106 of the Commission’s Rules to Allocate Spectrum at 2 GHz for use by the Mobile Satellite Service, *Second Report and Order and Second Memorandum Opinion and Order*, ET Docket No. 95-18, FCC 00-233 (rel. July 3, 2000) (“2 GHz Relocation Order”).

agreement on BAS relocation with Mobile Satellite Service (“MSS”) licensees during the mandatory negotiation period, the MSS licensees may relocate the BAS licensees involuntarily.² The two-year mandatory negotiation period is currently scheduled to expire on September 6, 2002.³

The Commission should stay the mandatory negotiation period because, as explained herein, the existence of at least three pending Commission proceedings that may result in further reallocation of the 2 GHz spectrum, and remaining challenges to the FCC’s 2 GHz rules, have generated tremendous uncertainty regarding how and by whom the 2 GHz spectrum will be used. This, in turn, has made it virtually impossible to engage in any meaningful relocation negotiations during the first 21 months of the two-year mandatory negotiation period. Indeed, to our knowledge, ICO is the only MSS licensee to have contacted BAS licensees regarding relocation, and these contacts have been limited to simple requests for inventories of the BAS licensees’ equipment. The MSS licensees have not attempted to engage in any substantive negotiations with BAS licensees regarding relocation.

II. 2 GHz-Related Proceedings

Faced with a mandate to identify spectrum that could be reallocated for third generation (“3G”) advanced wireless services, in August 2001 the Commission issued a notice of proposed rule making, in which it proposed to reallocate spectrum from several alternative sources for 3G use, including: (1) the 2 GHz spectrum that had been newly allocated to MSS; and (2) spectrum that was expected to be surrendered by the Department of Defense (“DOD”) and other federal agencies. The search for 3G wireless spectrum, however, has been greatly complicated by the events of September 11, 2001. In light of the need for better and more efficient government communications arising out of the war on terrorism, it is now considerably less likely that spectrum will be reallocated from use by DOD and other federal agencies to 3G advanced wireless services.⁴

Given its probable inability to recover sufficient spectrum for 3G from DOD and other government agencies, the Commission now is more likely to reallocate for 3G services some of the 2 GHz spectrum reallocated from BAS to MSS.⁵ If the Commission ultimately decides to re-allocate some of the 2 GHz spectrum for 3G terrestrial wireless services, additional 2 GHz relocation negotiations will need to be conducted between the BAS licensees and one or more of the 3G terrestrial wireless licensees, whose identity is yet to be determined. Thus, the outcome

² See 2 GHz Relocation Order at ¶ 48.

³ See 2 GHz Relocation Order at ¶ 46; *see also* 47 C.F.R. § 74.690.

⁴ See, e.g., Telecommunications Reports, “Spectrum Demands Will Grow, Military Brass Tells House Panel,” April 29, 2002; RCR Wireless News, “Industry, Military Locked in 3G Battle,” April 29, 2002.

⁵ See Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Advanced Services, *Further Notice of Proposed Rule Making*, ET Docket No. 00-258 (rel. August 17, 2001).

of the 3G proceeding may require the BAS licensees to negotiate the BAS relocation with additional parties.

In addition to the 3G advanced wireless proceeding, the Commission has initiated two other proceedings that will very likely result in modification of the 2 GHz allocation, making it even more difficult for the BAS and MSS licensees to engage in meaningful negotiations at this time.

First, in August 2001, the FCC initiated the ancillary terrestrial component (“ATC”) proceeding, in which the Commission is considering whether and to what extent MSS licensees should be permitted to use some of their 2 GHz MSS spectrum terrestrially.⁶ That proceeding was initiated as a result of a petition filed by ICO, which argued that MSS would **not be financially viable unless it were permitted to make terrestrial use of frequencies in the 2 GHz band for an ancillary terrestrial component of such satellite service.**⁷ Given the views of ICO and other MSS licensees as to the commercial viability of the satellite service without such a terrestrial component,⁸ and the uncertainty and controversy surrounding the ATC proposal,⁹ the future of MSS at best remains murky. Moreover, even if the Commission authorizes some type of terrestrial use of 2 GHz MSS spectrum, it will dramatically change the nature and dynamics of the relocation negotiations between the BAS licensees and the 2 GHz newcomers. Further, the outcome of the ATC proceeding may raise new interference concerns that will need to be addressed by the parties. Therefore, until the ATC issue is resolved, the parties’ ability to negotiate for the relocation of the BAS licensees is severely impaired.

Second, in March 2002 the Commission initiated a proceeding to consider a proposal by Nextel Communications, Inc. (“Nextel”) for Nextel to exchange some of its licensed 800 MHz

⁶ See Flexibility for Delivery of Communications by Mobile Satellite Service Providers, *Notice of Proposed Rule Making*, IB Docket No. 01-185 (rel. August 17 [6], 2001).

⁷ See, *Notice of Proposed Rulemaking, Flexibility for Delivery of Communications by Mobile Satellite Service Providers; Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service*, IB Docket No. 01-185 and ET Docket No. 95-18, 16 FCC Rcd 15532 at ¶ 25 (released August 17, 2001).

⁸ See, e.g., “Cingular, Sprint PCS Rebut New ICO'S Terrestrial Wireless Plans,” *Satellite Week*, May 20, 2002 (quoting Globalstar creditors’ committee as stating that “[w]ithout ATC authority, neither Globalstar nor any other MSS licensee will be able to raise adequate funding,” and characterizing FCC choice as being between “reinvigorating the MSS industry or abandoning it”).

⁹ See, Jeffrey Silva, “Abernathy Open to Using MSS Frequencies for Terrestrial Wireless,” *RCR Wireless News*, May 27, 2002, pg. 10; “Cingular, Sprint PCS Rebut New ICO'S Terrestrial Wireless Plans,” *Satellite Week*, May 20, 2002.

and 900 MHz spectrum for 2 GHz spectrum.¹⁰ If Nextel is permitted to exchange some of its 800 MHz and 900 MHz for 2 GHz spectrum, the BAS licensees also will have to negotiate relocation with Nextel. Once again, this uncertainty regarding who ultimately will be licensed to use the 2 GHz spectrum makes it impossible to negotiate effectively for relocation of the BAS operations at this time.

III. Pending Challenges to the 2 GHz Rules and Policies

Adding to the delay and uncertainty, the 2GHz Relocation Order itself is the subject of several pending petitions for reconsideration.¹¹ The resolution of these petitions for reconsideration, as well as any further administrative and judicial challenges, could alter the rules established by the Commission to govern relocating the incumbent BAS licensees. Moreover, the 2 GHz licensing orders, which awarded 2 GHz MSS licenses to eight MSS operators, are the subject of a pending application for review filed by terrestrial wireless providers.¹² If the application for review is successful, the eight MSS licenses issued by the Commission could be modified or cancelled. Finally, there is still a pending petition for reconsideration of the FCC's 2 GHz Service Order, in which the Commission established the rules and policies for licensing and use of the 2 GHz band for MSS.¹³

IV. Status of Negotiations

Given the uncertainty and delay generated by the pendency of the three 2 GHz-related Commission proceedings described above and the pending challenges to the 2 GHz rules and licensing decisions, it is not surprising that there have been virtually no meaningful negotiations during the first 21 months of the mandatory negotiation period. ICO has been the only MSS license to contact BAS licensees. Even these contacts have been limited to simple requests for inventories. ICO has not commenced actual negotiations.

V. Conclusion

¹⁰ See Improving Public Safety Communications in the 800 MHz Band, *Notice of Proposed Rule Making*, WT Docket No. 02-55, FCC 02-81 (rel. March 15, 2002).

¹¹ On September 6, 2000, the following parties filed petitions with the FCC seeking reconsideration of the FCC's relocation order: Society of Broadcast Engineers, Inc.; Cosmos Broadcasting Corporation, Cox Broadcasting, Inc., and Media General, Inc.; Enron North American Corp.; National Association of Broadcasters; SBC Communications, Inc.; Fixed Wireless Communications Coalition, Critical Infrastructure Communications Coalition, and United Telecom Council, Association of American Railroads, Association of Public Safety Communications Officials International, Inc., American Petroleum Institute; and Celsat America, Inc.

¹² See Application for Review of AT&T Wireless Services, Inc., Cellco Partnership d/b/a Verizon Wireless and Cingular Wireless LLC, DA 01-1635 (filed August 16, 2001).

¹³ See Establishment of Policies and Service Rules for the Mobile-Satellite Service in the 2 GHz Band, *Report and Order*, 15 FCC Rcd 16127 (2000); Petition for Reconsideration filed by the Wireless Communications Association International, Inc. (filed November 3, 2000).

In light of the foregoing, it makes no sense for the negotiation period to end now, before any negotiations have even commenced. By staying the mandatory negotiation period until the regulatory uncertainty is eliminated, the Commission can ensure that BAS licensees have a meaningful opportunity to negotiate with the MSS licensees and, if necessary, terrestrial wireless licensees, to craft a mutually beneficial relocation plan that will not need to be reworked following the resolution of the pending proceedings discussed above.

Respectfully submitted,

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